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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 672

H. B. NELSON CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 672

H. B. NELSON CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioner, H. B. Nelson Construction Company, prays that a writ of certiorari to review the judgment of the Court of Claims in the above entitled case be granted.

Opinion Below.

The opinion of the Court of Claims is not yet officially reported (R. 18-22).

Jurisdiction.

The judgment of the Court of Claims was entered June 3, 1940. A motion for a new trial was overruled on October 7, 1940 (R. 23). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented.

1. Did the court below have jurisdiction to dismiss the petition upon findings for which there is no basis?

2. Was the court's failure and refusal to make special findings of fact requested by petitioner, which are facts upon vital questions and indispensable elements in the case, a violation of this Court's Rule 41?

3. Are the findings of the court below sufficient to sustain judgment for respondent in view of the undisputed facts set out below?

4. Did the court below err in assessing liquidated damages against petitioner?

5. Is petitioner entitled to judgment for the amount asked by him upon the undisputed evidence in the case?

Statement.

Facts Not Disputed.

This case arose out of a contract between petitioner and respondent for constructing concrete foundations for three 300-foot and six 600-foot radio towers, at the Naval Radio Station, Summit, Canal Zone, in accordance with designated specifications and drawings, for the consideration of $47,816, the work to be commenced within ten days after date of receipt of notice to proceed, which was received on July 24, 1934. The foundations for the 300 foot towers to be completed within 45 days and the 600 foot towers within 75 days from the date of receipt of notice to proceed, making the completion dates September 7, 1934, for the 300-foot towers, and October 7, 1934, for the 600-foot towers. The 300-foot tower foundations were completed within the agreed time.

Prior to the bids, respondent made a survey of the site and probings with a pointed rod to determine the nature of

the subsoil controlling the need of piles, and their length, and made a log of these probings. The project is located alongside the Panama Canal, the nearest tower about 2,200 feet from the Culebra Cut (R. 12-15; Court Findings Nos. 1, 2, 3, 4).

Petitioner's representative, along with other representatives of prospective bidders, made an examination of the site of the proposed work in May, 1934, previous to petitioner's bid. The inspection trip was conducted by respondent's officer in charge of the work. It had rained the night before, and there were a few inches of water in some of the depressions (R. 34-35). The heavy rains do not occur there until October (R. 28-29).

All the tower sites had growing on them dense guinea grass 6 to 8 feet high. Respondent's representative had a trail cut through the grass, and led the party around the edge of the site (R. 35, 43). You would get lost if you tried to go any distance through the grass, and it was tall and coarse, and difficult to get through (R. 42).

Respondent's representative told the bidders that the Panama Canal was extending its drainage system there (R. 36, 43).

In addition to the drainage ditches, roads extended around the side of Tower 4, and there was a water line and a railroad spur coming into the site (Deft's. Ex. T).

Petitioner's representative, Gillogly, testified that respondent's representative, Commander Fogg, told him, during the inspection, that main new drainage ditch, which he pointed out, was put in for the drainage of the area, and lateral drainage ditches were then being opened by the Drainage Division of the Panama Canal (R. 23); that the site would be free from water because of these drainage ditches (R. 25).

Commander Fogg testified:

(a) That during the inspection trip he did not tell Gillogly that the area would be drained by the ditches and free from water; that he offered the bidders no opinions (R. 36).

(b) That he invited the attention of the bidders to the fact that the Panama Canal was extending their ditching system in there, but offered no opinions (R. 36, 43).

(c) He had been over it a number of times and knew that the site was in a marsh, an old lake bed, with drainage ditches, but not a thoroughly drained site, but he "ventured no information on it" (R. 39).

(d) That he knew it would be a difficult place to work in (R. 38, 43).

(e) That he knew that the area was near the slides that they had been having trouble with in the Panama Canal, and as several of the slides were adjacent to the site the drainage ditches were built to release *Flood Waters* so they would not stand there and soak up the soil and make more slides, and to take off the *Flood Waters* within a reasonable time; that he did not know when the first inspection trip was made whether the drainage system was adequate to take off the flood waters within a reasonable time. That it was a matter of the bidder's own responsibility, and that he was only responsible for showing the bidders the sites and conditions (R. 39-40). That the difference in the contract area from that when the inspection trip was made in May, until November, was that the heavy rains would come up and *flood the site* (R. 39).

The effect of the drainage ditches on the subsoil was not apparent on the inspection trip. (Finding 4; R. 14-15.)

Par. 7 of the General Provisions provides that,—

> "They" (the bidders) "will be furnished with such additional information as is available by the local Government representatives". (Plf's. Ex. 3.)

Previous to the bid, respondent furnished petitioner with a map, Plf's. Ex. 5 and Deft's. Ex. T, which showed drainage ditches, elevations, and the locations of the tower sites. This map did not contain symbols or indications showing swamps, or that the tower sites, 3 to 6, inclusive, were in a swamp and marsh. (Plf's. Ex. 5; R. 24.)

Section 2-01 of the Specifications provided,—

> *"that no artificial obstructions will be encountered"*. (Plf's. Ex. 2.)

Article 9 of the Contract provides that,—

> "* * * the contractor" (shall not be) "charged with liquidated damages in the completion of the work * * * due to floods". (Plf's. Ex. 1.)

Addendum 2 of the Specifications gave the length of the piles to be driven at towers 3, 5, and 6. (Plf's. Ex. 2.)

Petitioner relied, in making his bid, on his inspector's report of the site, on the maps furnished him, and upon the contract, General Provisions, and Specification Agreements (R. 27).

Although the notice to proceed with the contract work was not received by petitioner until July 24, 1934, and he was not required to commence work until August 3, 1934, ten days after said notice was received (Court's Finding No. 2; R. 12, Plf's. Ex. 1), he began clearing the site July 5, 1934, and started excavations for the 300-foot towers on July 18, 1934. (Deft's. Ex. Y.)

After petitioner placed his machinery on the site and began excavation at Foundation No. 1, respondent on July

27, 1934, had him make a soil bearing test because respondent knew that the soil had been excavated from the Panama Canal, and was not sure of its bearing value (R. 32), even though respondent was familiar with the site (R. 39), and had made a soil test to determine the length and number of the piles in order for the contractors to make their bids (R. 32).

The rainy season starts in gradually in May, becomes greater in June, lets up a little in July, gets heavier in August, and increasingly so in September, October, and November (R. 28-29).

Petitioner, during the progress of the work, found the soil conditions at the sites of towers 3, 4, 5, and 6 materially worse for doing the work than those contemplated under the contract, and represented by respondent, and then it was possible to see on the inspection trip previous to the bid,—

(a) Floods resulted from inadequate culverts (not shown on the maps furnished petitioner previous to his bids) which created an artificial obstruction by damming and backing up the water, and flooding the site (R. 24). The main ditch emptied through the culvert and that was the only way the water could drain from the site (R. 24). The culvert was higher than the surrounding ground (R. 26). The general engineering practice is to build culverts larger than necessary for average conditions, while this culvert was built to carry off water under average conditions (R. 31).

(b) The drainage ditches (shown on the map furnished petitioner previous to his bid, and pointed out to the inspection party by respondent's representative when he stated they were being extended by the drainage division (R. 36, 43)) proved to be inadequate, and not extended sufficiently to drain the site (R. 24-26). They were originally built

to release the *flood waters* so they would not stand there and soak into the soil, and increase the slides adjacent to the site (R. 39-40, 43). Petitioner found that tower No. 6 would be entirely submerged and flooded with water, which would take a day or two to drain (R. 26, 29), and that 80% of the time spent in constructing those foundations was lost on account of water conditions (R. 24); that it was necessary to operate pumps constantly during the entire period of construction at towers 3, 4, 5, and 6, and in some cases day and night (R. 24); that pumps were used 2086 hours, 260 eight-hour days (Deft's. Ex. Y); that water was on the surface 60% of the time at tower No. 4 (R. 24).

(c) Water and mud constantly flowed into the holes (R. 25-26) faster than it could be pumped out (Deft's. Ex. Y of Oct. 1, 1934), and flooded the site several feet above the tower foundations, and the lower part 12 to 15 feet deep (R. 26). In September, 1934, petitioner's men would sink up to their waists in the mud trying to hand up the mud, a bucketful at a time, and it was hard to make any progress (R. 25).

(d) Petitioner was mired half the time in transporting materials (R. 25). You could not get the machines to the site or work except on 24 x 30 foot mats, and you had to corduroy to get across. You could not work long before you had to move (R. 28).

(e) Roads built washed out, necessitating rebuilding. Due to the floods and undrained condition of the site, 3600 lineal feet of extra roads were required (R. 25, 28) which were difficult and expensive to construct, and had to be routed around the site for about 3000 feet, because the site was impassable (R. 25, 26, 28).

(f) Petitioner could not use his clamshell or excavating shovel during and after the rains, but had to employ extra

men to bail the water and mud out by hand, or use a barrel with the shovel to pull it out (R. 26, 28).

(g) The soil was not workable, trebling the cost at No. 6 (R. 26).

Several months after the work started, respondent gave petitioner a map, Plf's. Ex. 6, made before the bids were received, which showed swamps in the vicinity of the site. The swamps were not shown on the map, Plf's. Ex. 5, furnished petitioner previous to his bid (R. 24).

The specifications called for 180 piles in towers 3, 5, and 6, and designated the length of the piles at the three footings of each tower site. Tower 6-C required 20 pilings to be driven to a depth of 10 feet each. On September 22, 1934, the first pile was driven, but would not take up the required bearing. A 17½ foot pile was driven with the same result. So, the work was stopped. On September 26th a 27 foot pile was driven, which was satisfactory. All of the 20 piles had to be increased in length (R. 32).

Out of the 180 piles required on the three tower foundations, 91, or over 50%, were required by respondent to be increased in length (R. 31). As a result of the increase in the length of the 91 piles, all the piling had to be interchanged at the three sites, and additional piles had to be ordered from the United States, which arrived (after the original contract time had expired (R. 25, 26, 31), on November 20, 1934 (R. 31), causing a delay of over three weeks (R. 26, 31)).

As late as October 4, 1934, respondent wrote petitioner that in order to determine the length of piles needed at foundations Nos. 3 and 5, test piles were to be driven at these sites, and that he could obtain four 75 foot piles for that purpose, and two others could be obtained by splicing;

that the estimated pile lengths to be needed to be increased were (R. 33):

	Original.	Test Pile Length.
3-A	17 feet	37 feet
3-B	21 "	41 "
3-C	18 "	38 "
5-A	27 "	47 "
5-B	22 "	42 "
5-C	18 "	38 "
	123	243

Pilot piles were driven at towers 3, and 5, and respondent decided not to make additional tests (R. 32).

Petitioner's work would have been done with greater dispatch and less trouble if the site had been adequately drained, and his headway was greatly impeded because of the swampy, boggy site (R. 27, 42).

Respondent kept an inspector on the job the entire time the work was in progress, whose duty it was to inspect the site each day, and to report in writing all matters of consequence as to the work, and, among other things, any instance where the contractor retarded the progress of the work. (Deft's. Ex. Y.) These daily reports were accurate and correct (R. 29).

Davies, respondent's Civil Engineer, charged plaintiff with certain delays on specified parts of the work, but did not claim that petitioner was not engaged on other parts of the work during the periods specified (R. 33). Respondent's Daily Reports do not charge petitioner with retarding the progress of the work during the periods specified. (Deft's. Ex. Y.)

Petitioner employed enough men on the job, and employed as many as he could for the work (R. 37). He had to employ extra men to bail and excavate where he could not use his shovel (R. 26, 25, 28).

The necessary cost of construction work was	$67,996.38
A profit of 10% is	6,799.64
The cost of a bond would be	1,121.94
Total due petitioner	$75,917.96
Paid by respondent	49,121.42
Leaving unpaid	$26,796.54

(R. 27; Plf's. Ex. 7).

The additional prices allowed by the change orders covered only the additional cost of work and material made necessary by the changes, and included nothing for the additional cost in the general work caused by these changes through the delays which ensued, for which plaintiff was not responsible. (Change Orders A and B; Deft's. Exs. A, B, and C.)

Petitioner was charged with 31 days delay because of the buckling of the sheet piling; with 10 days' delay while a shovel was mired; and with other delays, but none of them are charged in the reports (Deft's Ex. Y).

Petitioner, in July, 1934, when the specifications showed that foundation piles only 10 feet long were needed at tower 6-C, drove sheet piling there, which buckled. Tests made by respondent September 26, 1934, showed that far longer piles were needed. The buckling was inevitable as the piles at a 10 foot depth had no substantial foundation to rest on (R. 25, 29, 31). Respondent's mistake in the specifications of 10 feet involved petitioner in both loss of time and added expense. (Id.)

Petitioner's shovel slid off a mat into the mud November 8th. Every effort was made for 10 days to pull it out with the equipment on hand, but without being able to move it. Petitioner then brought in another shovel and pulled the first one out. While the shovel was mired, petitioner was

doing work at other places, and the inspector did not charge any delay for the miring. (Deft's. Ex. Y; R. 24, 33.)

Petitioner signed the change orders and release because he had to have pay for his men and for material and the officer in charge notified him: "No change order no money" (R. 37). Respondent refused to make payments unless petitioner accepted them in full, over petitioner's protest (R. 26, 27). Petitioner repeatedly complained of conditions and the Government agent's arbitrary action and asked for an extension of time and additional compensation, and appealed to the Secretary of the Navy (Deft's. Ex. H; R. 26, 27). The Government took no action, but 35 days after the work was completed refused to make payments unless accepted in full for specific work listed under the contract and the Change Orders, in which delays were not mentioned (R. 26, 27; Deft's. Exs. B and C).

Specification of Errors to be Urged.

I.

Petitioner urges that the Court of Claims erred in failing and refusing to find the following Findings of Fact requested by petitioner, viz.:

(1) It exhibited a map, Plf's. Ex. 5, which did not show, and from which petitioner could not see, that the sites of towers 3, 4, 5, and 6 were swampy and marshy (R. 24; Plf's. Ex. 5), although respondent had made and had another map showing that the vicinity was swampy (Plf's. Ex. 6; Fogg, R. 37), which was not shown petitioner until 3 months after the work was started (R. 24).

(2) In May, 1934, before the heavy rains, which start in October, an inspection trip was made by Public Works Officer Fogg who led the party around the edge of the swamp, on a trail cut through dense grass 6 to 8 feet high which

covered the site, not venturing on the marshy ground or any of tower sites 3 to 6 inclusive (Fogg R. 35, 43; Court's Finding 4; R. 15).

(3) The map shown petitioner showed the site as having drainage ditches (Deft's. Ex. T and Plf's. Ex. 5; Fogg 38), and Fogg stated that the Panama Canal was extending its drainage system there (Fogg, R. 36, 43).

(4) That Fogg, the officer in charge, knew but did not tell petitioner (R. 36, 43).

(a) That the ditches were to take off the *Flood Waters* and prevent slides, which had occurred frequently (R. 39, 40);

(b) That they would not drain the water that soaked into the soil (Id.);

(c) That the site would be difficult to work in (R. 38, 43), with inadequate drainage (R. 39, 40, 43), and would collect waters, and be flooded (Id.); and

(d) Fogg, although he knew the amount of rainfall, testified that if the bidders wanted information as to the rainfall they could get it themselves as best they could (R. 41).

(5) Petitioner relied in making his bid on Gillogly's report, on the map furnished him (Plf's. Ex. 5), and on the specifications and agreements of the contract (R. 27).

(6) The length of 91 out of 180 piles were erroneously estimated in the specifications (R. 31); piles at three sites had to be exchanged (R. 25); at one site they were so much longer than specified that new piles had to be ordered from the United States (R. 25, 26, 31), causing a delay until six weeks beyond the contract completion time (R. 12, 31); the

exchange of piles was over swampy ground, taking a long time and being difficult and expensive (R. 25, 26).

(7) The specifications provided—

> "Bids shall be based on the following: That no artificial obstruction will be encountered" (Plf's. Ex. 2).

The culverts were built only to carry water under average conditions, whereas the general engineering practice is to build a culvert larger than necessary for average conditions (R. 31); the bottoms of the culverts were higher than those of the ditches and than the surrounding ground (R. 26), which caused the water to back up and flood the site, and was an artificial obstruction to drainage (R. 24, 26); water remained 2 feet above the ground surface 12 hours at a time (R. 26, 29); the site was so flooded that it was necessary to use pumps 2086 hours, 260 eight-hour days (Deft's. Ex. Y; —).

(8) Fogg told the bidders that the main ditch was put in for drainage of the area (R. 23); would be adequate to take care of the water (R. 23), and other lateral ditches were being opened (R. 26, 43), and that petitioner would have a workable site (R. 23).

(9) The contract provides (Plf's. Ex. 1)—

> "* * * the contractor" (shall not be) "charged with liquidated damages because of any delays in the completion of the work due to * * * floods * * *." (Contract, Art. 9).

(10) Petitioner found, at towers sites 3, 4, 5, and 6—

(a) The ditches and culverts inadequate (R. 24, 26, 29, 39, 40);

(b) Floods resulting from the inadequate culverts impeded, hindered, and delayed the work, making it almost

impossible, as the men were up to their waists in mud (R. 25);

(c) Water and mud constantly flowed into the holes faster than it could be pumped out (Deft's. Ex. Y) several feet above the footings and the lower part 12 to 15 feet deep (R. 25, 26);

(d) Following rains, the surface was submerged for a day (R. 26, 29);

(e) The soil was not workable, trebling the cost (R. 26);

(f) You could not get the machines to the site of the work there except on mats, or work long before you had to move (R. 28);

(g) Roads built washed out, necessitating rebuilding (R. 25, 28);

(h) Trucks mired and it took 10 or 12 men to get them out (R. 28);

(i) Petitioner was mired half the time in transporting materials, which some times required unloading trucks or getting other trucks to pull them out, or carrying the material by hand (R. 25, 28);

(j) Extra men had to be used in excavation, as a steam shovel could not be used (R. 26) or the mud had to be taken out with a barrel from a crane, as you could not dig it with a clamshell (R. 28);

(k) There was always trouble at No. 6 in moving equipment in and out due to mud and water, and the roads washing out, and requiring mending (R. 24-26).

(11) Respondent advised petitioner in October 1934 that it intended to make new tests at towers 3 and 5, as it had found the original length at No. 6 was erroneous, (but later

determined that new tests at 3 and 5 were unnecessary (R. 32, 33).

(12) Respondent drove piling piles at foundations 3 and 5 to determine the bearing value of the soil early in October 1934 (R. 32).

(13) Taking piles from No. 5 required new piles for it from the United States, which were ordered promptly, but did not arrive until November 20th, whereby respondent delayed completion six weeks beyond the original contract time (R. 25, 26, 31).

(14) The work would have been done with greater dispatch and less trouble had the site been adequately drained, and petitioner's headway was greatly impeded because the site was swampy and boggy (R. 25, 27, 42, 45, 46).

(15) Petitioner would have completed the job in the contract time if the site had been such as respondent represented, and if the agreement that there would be no artificial obstructions had not been broken through improperly constructed and inadequate culverts and floods caused thereby (R. 25, 27).

(16) Respondent kept an inspector on the job all the time the work was in progress to inspect the site each day, and report in writing all matters of consequence as to the work. Respondent put the reports in evidence and proved that they are accurate and correct (Deft's. Ex. Y; R. 29).

The inspector's report fails to show that petitioner was chargeable with any delays in the progress of the work (Deft's. Ex. Y).

Davies charged petitioner with certain delays on specific parts of the work, but the reports show that during these times petitioner was engaged on other parts of the work, and Davies does not claim that petitioner was not so engaged (Deft's. Ex. Y; R. 33).

Only the following time was taken to repair equipment during the 7 months the work was in progress, viz—

Concrete mixers, parts of 6 days—mostly very small parts; pile and sheet driver and shovel very small parts of 5 or 6 days (Deft's. Ex. Y).

(17) Petitioner had enough men on the job (R. 37).

(17-a) Towers 3, 4, and 5, as to which only delays are claimed had not been used for 3½ years after the work had been completed. They have not been used yet. An attempt was made in 1936 to use them, but it was abandoned. No proof was made of damages through failure to complete these towers on time (R. 34).

(17-b) The necessary cost of construction work was $67,996.38
A profit of 10% is 6,799.64
The cost of a bond would be 1,121.94

Total due petitioner $75,917.96
Paid by respondent 49,121.42

Leaving unpaid $26,796.54,

for which petitioner is entitled to judgment (R. 27; Plf's. Ex. 7).

(18) The additional prices named in the change orders and paid covered only the additional cost of work and material made necessary by the changes set out in said orders, and included nothing for the additional and extra cost in the general and other work caused by and directly resulting from these changes and the unforeseen difficult nature of excavating for and constructing the tower foundations, causing the delays which ensued, and the increased cost, for which petitioner was in no wise responsible (Deft's. Exs. A, B, C, and G).

(19) Petitioner was charged with 31 days' delay because of the buckling of the sheet piling; with 10 days' delay

while a shovel was mired; and with other delays, but none of them are charged in the reports (Deft's. Ex. Y).

(20) Petitioner drove sheet piling at foundation 6-C, relying on respondent's specifications estimate that only 10 foot foundation piles were needed there (Plf's. Ex. 2), but further tests showing longer piling necessary were made September 26, 1934 (Deft's. Ex. Y).

Respondent did not suggest a rectangular instead of a circular form of sheet piling until after the piling caved in (R. 30, 31), which was not caused by the form of driving the sheet piling, but by respondent's erroneously showing that only 10 foot foundation piling were needed (R. 25, 32; Plf's. Ex. 2).

Petitioner's shovel slid off a mat into the mud November 8th. Every effort was made for 10 days to pull it out with the equipment on hand, but without being able to move it. Petitioner then brought in another shovel and pulled the first one out. While the shovel was mired, petitioner was doing work at other places, and the inspector did not charge any delay for the miring (Deft's. Ex. Y; R. 24, 25, 33).

Petitioner signed the change orders and release because he had to have pay for his men and for material and the officer in charge notified him: "No change order no money" (R. 37). Respondent refused to make payments unless petitioner accepted them in full, over petitioner's protest (R. 26, 27). Petitioner repeatedly complained of conditions and the Government agent's arbitrary action and asked for an extension of time and additional compensation, and appealed to the Secretary of the Navy (Deft's. Ex. H; R. 26, 27). The Government took no action, but 35 days after the work was completed refused to make payments unless accepted in full for specific work listed under the contract and the Change Orders, in which delays were not mentioned (R. 26, 27; Deft's. Ex. B, C, and G).

II.

The Court of Claims erred in making the following special findings of fact:

(1) The party proceeded to the site of each tower and viewed the existing conditions (Court's Special Finding No. 4, p. 4; R. 14).

(2) All the sites had sufficient access thereto for inspection was made possible by a trail cut through the grass by a native using a machete (R. 15).

(3) The contractor based his bid on the inspection thus made by his representative. He made no application to defendant's officers for further information. Defendant's officers made no representation to the contractor or his representative that the site was otherwise than it appeared to be and concealed no material fact from either of them (Id.).

(4) The buckling of the sheet piling at Tower Site 6 could have been avoided by a more efficient form of cofferdam, and the use of shoring (No. 5; R. 15).

(5) The miring of petitioner's shovel delayed the progress of the work (R. 16).

(6) The contractor consumed more time in prosecution of the work than estimated by him, by lack of equipment adequate for the conditions actually encountered, breakdowns in equipment, and the failure to prosecute the work more vigorously. The delays experienced threw the work into the dry-weather period, during which time the work could be done faster than during the rainy season (Id. No. 6; R. 16, 17).

(7) For all delays occasioned by the Government there has been given the contractor adequate extension of time

for performance, together with fair and reasonable compensation (Id. No. 7; R. 17).

(8) There is no proof that the decision of the Secretary of the Navy, on appeal, was mistaken in matters of fact (No. 9; R. 17).

III.

The Court of Claims erred in making the following conclusions of law:

(1) Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against the plaintiff for the cost of printing of the record herein, the amount thereof to be ascertained by the clerk and collected by him according to law (R. 17, 18).

IV.

The Court of Claims erred in making the following findings in its opinion:

Plaintiff made its own examination of the site along with other bidders and had full opportunity to become acquainted with all the conditions. No information in the possession of the Government was withheld from the contractor who did not seek during the execution of the contract any further information from the defendant but relied entirely upon its own inspection (R. 20, 21).

The Commissioner has found and, after a thorough investigation of the record, we are convinced that there was no misrepresentation as to the condition of the site and that the Government furnished the plaintiff with all the information in its possession which had any bearing on the contract. Whatever changes were made, due to sub-surface

conditions, were carried out in strict conformity with the terms of the contract, a fair and reasonable compensation for the extra work was allowed, and a reasonable extension for the completion of the contract was made. The evidence shows that plaintiff was a member of the Boards which passed on these changes and agreed that they were satisfactory both as to amounts and to extension of time (R. 21).

(2) There is no showing that there was any duress of coercion brought to bear on the plaintiff to execute this release but it was executed in due compliance with the terms of the contract as above set forth. This release is binding on the plaintiff (R. 21).

(3) The record fails to disclose that there are any misrepresentations on the part of the defendant as to the conditions to be encountered at the site or any sub-surface conditions or delays for which the plaintiff was not fully compensated and a reasonable extension of time for the completion of the contract granted. A careful perusal of the evidence shows that the terms of this contract were faithfully and carefully preserved and every step taken by the Government was in compliance with the terms of the contract (R. 22).

(4) The delays which were not compensated for were those arising from the failure of the plaintiff to expedite the work by having adequate equipment and a vigorous prosecution of the work by an adequate crew of workmen (R. 22).

The facts show that the delays were caused by the plaintiff and the defendant was in no way responsible for any delays for which liquidated damages have been assessed (Id.).

There can be no recovery on the part of the plaintiff and its petition is dismissed. It is so ordered (Id.).

Reasons for Granting the Writ.

(1) The Court of Claims failed and refused to make petitioner's requested Special Findings of Fact which are upon vital questions and are indispensable elements in the case, and not in dispute, in disregard of Rule 41 of the United States Supreme Court. The requested Special Findings of Fact are set out under Point I in the Specification of Errors to be urged, and are sufficient to entitle petitioner to judgment under the authorities of this Court, and all other authorities, as follows:

(a) The specifications provided that there would be no artificial obstructions on the site (Plf's. Ex. 2, p. 6), but respondent created an artificial obstruction in providing an inadequate culvert, which backed water up and flooded the site, and made work far more difficult and expensive, and took much more time than it would have been the case without floods, as shown under Point I-10 above. The failure to find these important facts, and to hold that there was a breach of warranty and misrepresentation by respondent, which entitles petitioner to recover his damages of $26,796.54 (R. 24-27) is in conflict with the decisions of this Court (*U. S.* v. *Esnault-Pelterie*, 299 U. S. 201; *Hollerback* v. *U. S.*, 233 U. S. 165; *U. S.* v. *Spearin*, 248 U. S. 132, 134, 135; *U. S.* v. *Atlantic Dredging Co.*, 253 U. S. 1, The Court of Claims; *Rust Engineering Co.* v. *U. S.*, 86 Ct. Clms. 461; *Sobel* v. *U. S.*, 88 Ct. Clms. 159, and the Federal Circuit Courts; *Monroe Contracting Co.* v. *Westchester County*, 94 F. (2d) 580, 584; *Passaic Valley S. Comrs.* v. *Holbrook Etc. Co.*, 6 F. (2d) 721).

(b) The contract included certain maps and drawings showing drainage ditches for the site (Plf's. Ex. 5; Deft's. Ex. T), which the petitioner had the right to assume would be sufficient to drain the site, and petitioner was further misled by Fogg's telling him (to induce him to believe that

the site would be adequately drained), as Fogg himself testifies, that the Panama Canal was extending its drainage system there (R. 36, 43). The drains proved utterly inadequate to drain the site as shown under Point I-10 above. The failure to find this material fact, and to hold that petitioner is entitled to the said damages he suffered as a result of respondent's misrepresentation and warranty, is in conflict with the decision of this Court, as shown by the authorities set out above, and with the decisions of the Federal Circuit Courts of Appeals, and those of the State Courts of last resort (*Horgan* v. *Mayor,* 160 N. Y. 516, 522; *Norrington* v. *Wright,* 115 U. S. 188).

(c) The lengths of 91 out of 180 piles were erroneously estimated in the specifications (R. 31). Piles at three sites had to be exchanged (R. 25). At one site, they were so much longer than estimated that new piles had to be ordered from the United States, which did not arrive till six weeks after the completion date (R. 26, 31, 12). The exchange of piles was over swampy ground, and took a long time, and was difficult and expensive (R. 25). These changes owing to the unforeseen difficult nature of the soil to work in resulted in and amounted to a complete alteration and abandonment of the contract, and entitled petitioner to recover on a *quantum meruit* the cost of work less the payments made, long unpaid $26,796.54 (R. 27), and the refusal of the Court below to grant this relief was error, and in conflict with the prior decisions of the Court below and the decisions of this Court, as cited above.

(d) Fogg, respondent's officer in charge, failed to disclose the difficult nature of the site (which was well known to him), and respondent likewise misrepresented it, to petitioner's loss (R. 23-26, 40, 43): Fogg knew that the site would collect water and be flooded (R. 39, 40, 43), and would be difficult to work in (R. 43) with inadequate

drainage (Id.), and that the ditches were to take off flood waters as well as they could, and prevent earth slides, which had frequently occurred (R. 40), but he did not tell the bidders any of these facts, but testified that he ventured no information as to whether the ditches were adequate (R. 27, 39, 43), and that if the bidders wanted information as to the rainfall to determine the adequacy of the ditches, they could get it themselves as best they could (R. 41); that he took the bidders to the site so that they could look and form their own conclusions, as to whether the drainage system was adequate, that he felt responsible for showing them the sites and conditions, but not for any matters of their own judgment (R. 40), the inspection trip was made before the rainy season (R. 14, 28, 29) on a trail over high ground through dense, thick grass 6 to 8 feet high (R. 35, 42), making it impossible for the bidders to see enough to form a dependable judgment, all in violation of a provision in the contract that

> "They" (the bidders) "will be furnished with such additional information as is available by the local Government representatives" (Par. 7, Gen. Provs.; Plf's. Ex. 3).

And respondent showed petitioner a map from which it could not be seen that the site was marshy and swampy (Plf's. Ex. 5), although it had made and had one which showed this condition (Plf's Ex. 6). This breach of the contract and the failures to disclose material facts rendered respondent liable for the loss of $26,796.54 (R. 27) petitioner suffered, and the refusal of the Court below to grant judgment for this amount was in conflict with the decisions of this Court, and of the Court below, as cited above.

(e) The contract provides—

> "* * * the contractor" (shall not be) "charged with liquidated damages because of any delays in the

completion of the work due * * * floods * * *." (Contract, Art. 9; Plf's. Ex. 1).

It is undisputed that there were floods throughout the progress of the work which hindered and delayed the work, and made it nearly impossible, as fully described in the Specification of Errors, Point I, Nos. 7 to 10 inclusive, yet the Court below refused to find that the contract contained the above quoted provision, and in disregard of it, and of the fact that there were continuous floods which hindered and delayed the work charged petitioner with $3,950 liquidated damages (Court's Finding Nos. 8, 9; R. 17), which holding is in conflict with the above quoted provision of the contract, and the decisions of this Court and of the Court below, which hold that if only part of the delays were caused by respondent (and here respondent caused them all), it could not assess liquidated damages against petitioner (*U. S.* v. *United Eng. Co.*, 234 U. S. 236; *Standard Steel Co.* v. *U. S.*, 67 Ct. Cls. 445; *Greenfield Tap & Die Corp.* v. *U. S.*, 68 Ct. Cls. 61; *Christensen Constr. Co.* v. *U. S.*, 72 Ct. Cls. —; *Bethlehem Steel Co.* v. *U. S.*, 75 Ct. Cls. 845).

(2) The Court of Claims erred in making the Special Findings of Fact set out under Point II of the Specification of Errors, all of which are plainly without support in the evidence. These findings are in conflict with the decisions of this Court in *General Talk. Pictures Corp.* v. *Western El. Co.*, 304 U. S. 175, 178.

Conclusion.

The Findings of the Court of Claims set out in Point II of the Specifications of Errors to be urged, are not the ultimate facts. Such facts are set out as errors for failure to find under Point I. As respondent put in issue all the

allegations of the complaint (R. 1-11) by its general traverse (R. 11), the findings in order to be sufficient to sustain judgment must specifically decide all the questions, which are mainly,—

(a) Did petitioner encounter artificial obstructions, contrary to Section 2 of the specifications, by respondent's insufficient and inadequate culverts and drainage ditches which backed water up and flooded the site?

(b) Was petitioner entitled to rely upon and to assume that the drainage ditches shown on the maps respondent furnished him previous to his bid (Deft's. Ex. T; Plf's. Ex. 5), and pointed out to him by Commissioner Fogg as being extended, were sufficient to drain the site?

(c) Was petitioner released from paying liquidated damages on account of the floods under Article 9 of the contract, and because of the delays caused by respondent?

(d) What was the necessary cost expended by petitioner? What amount is petitioner entitled to recover?

The Court of Claims is also required but failed to include circumstantial facts sufficient to warrant its conclusion in respect to the main issues.

The failure to find such ultimate and circumstantial facts in respect to the main issues is in conflict with Rule 41 of this Court, and *U. S.* v. *Esnault-Pelterie,* 299 U. S. 201.

The failure of the lower Court to make specific findings upon the main issues entitled petitioner to a Writ of Certiorari, as this Court may now, under the Act approved May 22, 1939, amending subsection b of section 3 of the Act of February 13, 1925 (43 Stat. 936, 939, c. 229; U. S. Code, Title 28, Sec. 288b), examine, analyze, and compare the circumstantial facts found, with the evidence brought up, to

ascertain whether as matter of law petitioner is entitled to judgment.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims is not yet officially reported (R. 18-22).

Jurisdiction.

The judgment of the Court of Claims was entered June 3, 1940. A motion for a new trial was overruled on October 7, 1940 (R. 23). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented, Specification of Errors to be Urged, and Statement of the Case.

A statement of the questions presented, specification of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT.

The Court of Claims failed and refused to make special findings of fact requested by petitioner, based on undisputed evidence, so material and indispensable that, if made, they would have entitled petitioner to judgment, as required by Rule 41 of this Court, and it also made findings on material questions both contrary to the evidence and with no evidence to sustain them.

The findings of fact requested but refused are set out under I of the Specification of Errors to be urged, and those contrary to the evidence or without evidence to sustain them are set out under II of said Specification of Errors.

The refusals to find and erroneous findings may be classified under 4 heads, viz,—

(1) Violations by respondent of agreements in the contract;

(2) The showing of drains in the map exhibited to petitioner entitling him to assume that they would be sufficient to drain the site;

(3) Concealments and failures to disclose;

(4) Misrepresentations and unforeseen conditions.

These points are urged separately as follows,—

(I) *Respondent violated its agreement,*

"That no artificial obstruction shall be encountered".
(Sec. 2-01 Spefctns. p. 7; R. 13.)

(a) There were inadequate and improperly constructed culverts over the main ditch (Rspdt's. Engnr. Davies, R. 31; R. 24, 26), which backed up the water and hindered the drainage of the site, and caused floods (R. 24-26); water remained 2 feet above the ground 12 hours after a rain (Davies, R. 29; R. 26), and it rained 14 days in each of the months of August and September, 26 days in October, and 27 days in November (Deft's. Ex. Y); it was necessary to use pumps 2086 hours,—260 eight-hour days (Deft's. Ex. Y; Fogg R. 37); the work was impeded, hindered, and delayed through the floods, making it almost impossible, as the men would be up to their waists in mud (R. 25, 26), making machine work impossible, and making it necessary to do the work by hand (R. Id., 28), and resulting in the loss of $26,796.54 by petitioner (Specification of Errors 10, 17-b). (* Specification of Errors hereinafter called S. E.).

(b) The court refused to find the facts above stated (S. E. 7).

The claim is for the damages growing out of this violation of contract.

(a) The inadequate and improperly constructed culverts constituted an obstruction, and a breach of the contract, entitling petitioner to judgment.

(*Commonwealth* v. *Erie Etc. R. R. Co.*, 27 Pa. 339, 67 Am. Dec. 471, 477; *Gorham* v. *Withey*, 52 Mich. 50, 17 N. W. 272; *Patterson* v. *Vail*, 43 Iowa 142, 145; *Ladd v. Wilson*, 14 F. Cas. 926; *The Swan*, 19 Fed. 455; *Funk & Wagnalls New Standard Dictionary; Hollerback* v. *U. S.*, 233 U. S. 165; *Christie* v. *U. S.*, 237 U. S. 234; *U. S.* v. *Spearin*, 248 U. S. 132; *U. S.* v. *Behan*, 110 U. S. 338.)

The refusal to find the facts above stated was in conflict with the Rule of this Court (Rule 41).

(II) *Drainage ditches were shown on the map exhibited to petitioner, entitling him to assume that they would be adequate to drain the site.* (Plf's. Ex. 5; Deft's. Ex. T; Fogg R. 38.)

This was emphasized by Fogg (Respondent's officer in charge), who stated, on the inspection trip that the Panama Canal was extending its drainage system there (Fogg R. 36, 43).

The court below refused to find these undisputed facts (S. E. 3).

Fogg's assurance could have no other effect, and was obviously intended to lead petitioner to believe that the ditches would be adequate to drain the site. The showing of the map alone, which misled petitioner to his prejudice, was strengthened by Fogg's assurance.

The petitioner suffered large damages through the ditches failing to be adequate, which he is entitled to recover.

> "A contract for clearing and concreting the bottom of a park lake * * * contained provisions that the contractor should drain off all water * * *. There

> was an outlet pipe in the bottom of the lake, the gate of which only was visible on the contractor's personal examination * * *, but on his attempting to draw off the water thereby, * * *, the underground pipe * * * failed to remove the water for a considerable depth. The contractor was * * * compelled to pump out the water, and * * * he claimed to recover * * * as for extra work. *Held,* * * * that he could properly assume that the water could be discharged through the outlet * * *; and that he was entitled to recover * * * the cost of pumping necessitated by the failure * * * to have the outlet pipe in working order." *Horgan* v. *The Mayor,* 160 N. Y. Rpts. 516; *Norrington* v. *Wright,* 115 U. S. 188).
>
> "* * * the contractor should be relieved if he was misled by erroneous statements in the specifications," (or, as here, in a map). (*U. S.* v. *Spearin,* 248 U. S. 132, 136.)

The failure of the court to find the facts above stated was in conflict with the Rule of this Court (Rule 41).

(III) *Respondent concealed and failed to disclose material facts as to the site, resulting in the loss by petitioner, which he is entitled to recover.*

(a) The contract provides,—

> "They" (the bidders) "will be furnished with such additional information as is available by the local Government representatives." (Par. 7 of Gen. Provns.; R. 14.)

(b) Respondent exhibited a map to petitioner not indicating that the site was swampy (Plf's. Ex. 5; R. 24), when respondent had made and had another map showing these conditions (Plf's. Ex. 6; Fogg R. 37; R. 24), but not shown petitioner until months after the work was started (R. 24; S. E. 1).

(c) Fogg, the officer in charge, knew the site thoroughly (R. 39), but failed "to furnish petitioner this available information", but led him to believe that the site would not be difficult to work in (R. 24, 25).

(1) Fogg knew that the ditches were to take off flood waters and prevent frequent slides (R. 40); that they would not drain the site (R. 40; that it would be difficult to work in (R. 38, 43), inadequately drained (R. 40, 43), collect water and be flooded (Id.), yet the only definite thing he told the bidders was that the drainage system was being extended (R. 36, 43).

(2) Gillogly, petitioner's employee at the time, but not when he testified, and disinterested, swears that Fogg said that the main new drainage ditch was put in for the drainage of the area, and would be adequate to take care of the water, and other lateral drainage ditches were now being opened * * * which would take care of the water conditions" (R. 23, 25).

(3) Fogg denies this, but he made so many contradictory statements on material facts that his testimony is not entitled to any weight. (*Hom Dong Wah* v. *Weedin*, 24 F. (2d) 774, 775.) He testified,—

(a) As stated above, that he was familiar with the lack of drainage; and, to the contrary, that he had no belief as to its adequacy (R. 39, 40).

(b) That the amount of rainfall was unknown (R. 41), and, later, that it averaged 10 inches a month from May to October, and 15 inches from the middle of October to the last of November (R. 41).

(c) That having special knowledge and special equipment, it is about as easy to work land under as above water, and, later, that it is more expensive and takes more time (R. 41).

(d) That "I ventured no information on it" (the site) (R. 39); "I felt that if they wanted that information" (as to the rainfall), "they could get it themselves as best they could" (R. 41); and, to the contrary, "I think I told them about the rainfall" (R. 41), "I gave them as full and complete information as I could" (R. 38, 43).

Fogg must have knowingly testified incorrectly in one version or the other of each of the above four matters.

Again Fogg testified, (as though there), to the cause of the cave in (R. 35), but he was in the hospital from July 21st, when driving sheet piles started, till August 15th, when the cave in occurred (Deft's. Ex. Y; R. 38).

Again he testified that the work was not opened up fast enough (R. 37), but excavating was started July 18th on the 300-foot towers, which were finished on time, and on the 600-foot towers on July 21st, and he was in the hospital then (Deft's. Ex. Y; R. 38).

(e) Fogg admits, as shown, that he ventured no information on the site (R. 39),—that although he had complete information available, he did not furnish it to petitioner (R. 39, 40), on which admission petitioner has the right to rely, (3 Wigmore, § 1457, p. 191).

(4) The inspection trip afforded no material information as to the site, and was misleading (R. 25, 43).

Fogg testified,

> "We skirted around the edge of the swamp as anyone would trying to keep from getting mired down" (R. 43).
>
> "All of the tower sites at that time had very high guinea grass, much of it 6 to 8 feet high. I had a native trail cutter cut a trail for us (R. 35). I would not call it" (the grass) "impenetrable. You could get through it if you wanted to, but you would probably get lost if you tried to go any distance through it" (R. 42).

The inspection was made in May, and the heavy rains did not occur until October (Davies R. 28, 29; R. 14; Fogg R. 41).

One McMenimen stated that he could see over the site, but his visit was July 17th, after two weeks spent clearing it (Deft's. Ex. Y; R. 44), and when the grass left, was only one foot to 18 inches high (R. 45). This is no evidence that the site could be seen before the clearing, and with the grass 6 to 8 feet high (R. 35).

The court below refused to find these facts, contrary to Rule 41 of this Court (S. E. Nos. 2, 4, 8).

Respondent's failure to furnish its available information, (here especially as it agreed to do so), renders it liable to petitioner for his loss.

(*U. S.* v. *Atlantic Dredging Co.*, 253 U. S. 1; *U. S.* v. *Gibbons*, 109 U. S. 200; *Christie* v. *U. S.*, 237 U. S. 234; *Passaic Valley Etc.* v. *Holbrook* * * * *Corp.*, 6 F. (2d) 721, 724; *U. S.* v. *Spearin*, 248 U. S. 132, 124, 135).

(IV) *Respondent made material misrepresentations as to the site, and unforeseen subsoil conditions developed, causing damage, which petitioner is entitled to recover.*

(a) 180 piles were driven. Their lengths were shown in the Specifications (Plf's. Ex. 2. Addendum 2, p. 1), but 91 of those were incorrect, necessitating exchanges between sites over ground so soft that mats had to be used (R. 31, 25, 28), trucks mired and had to be pulled out, and at times material had to be unloaded and carried by hand (R. 25, 28), making the work difficult and expensive. The piles required at site 6 were so much longer than specified that others had to be ordered, causing a six weeks delay beyond the completion date (R. 25, 31), and into the extremely heavy rainy season (Deft's. Ex. Y. October 7th to December 1st).

The court below refused to find these facts, although undisputed (S. E. 6).

Changing the lengths of 91 out of 180 piles proves that the depth to which the subsoil was unstable was unforeseen by the parties, and respondent misstated conditions as to this, and petitioner is entitled to recover his loss through these unforeseen conditions. (*Rust Engineering Co.* v. *U. S.*, 86 Ct. Cls. 461; *Sobel* v. *U. S.*, 88 Ct. Cls. 149, 165; *Hollerbach* v. *U. S.*, 233 U. S. 165, 172).

This was also a complete change from the contract work, which entitles petitioner to recover on a *quantum meruit.* (*Clark on Architect Owner & Builder,* p. 291; *Waste in Industry,* p. 72; *8th Annual Housing Convention,* p. 253, 254,—Limiting Waste; *Rust Engineering Co.* v. *U. S.*, 86 Ct. Cls. 466, 476; *Sobel* v. *U. S.*, 88 Ct. Cls. 149, 165).

(V) *Petitioner suffered a loss of $26,796.54 through respondent's violations of its contract and its concealments of and failures to disclose, and misrepresentations of material facts as to the site, and through unforeseen conditions, but the Court below refused to find these facts, in conflict with Rule 41 of this Court.*

(1) That petitioner suffered a loss of $26,796.54 is undisputed (R. 27; Plf's. Ex. 7).

(2) This loss arose from the site being more difficult to work in than respondent represented and agreed it would be:—

Fogg, respondent's officer in charge, states,—that petitioner's "headway was greatly impeded by the fact that the area was boggy, swampy, and in consequence he had great difficulty in getting over it, and doing his work in it" (R. 43). "If the site had been thoroughly drained, the problem of building the tower foundations would have been much simpler" (R. 42).

Gillogly swore, "At tower No. 6, 80% of the time was lost on account of water conditions (R. 24); we were mired down

at almost every point we approached on these towers (R. 24); 3600 lineal feet of road were made necessary; if the soil had been as represented we would have completed the contract within the contract time" (R. 25).

Nelson swore, "In September my men would sink to the waist in the mud trying to hand up mud, and it was hard to make any progress at all. Water and mud was constantly flowing into the holes, every hour of the day. The water would back up at the culvert" (R. 25).

The extra roads cost between $6,000 and $8,000 (R. 26).

(3) *Respondent made no substantial or definite proof that petitioner's loss arose otherwise than as above described.*

(a) Fogg and Davies testified for respondent that petitioner's equipment was inadequate (R. 41, 36, 29, 30), but neither of them stated how or in what respect, and neither of them was qualified as an expert, and their testimony is, therefore, of no value (20 Am. Jur. § 813, p. 683).

Davies claims that petitioner should have had an extra set of equipment for breakdowns (R. 29, 30), but the work lasted 223 days, with equipment under repair only 12 days, and part only at a time (Deft's. Ex. Y.); Davies admits that occasional breakdowns were to be expected (R. 33), and the breakdowns here were not even occasional, but rare, in spite of conditions ruinous to machinery.

Fogg said that the equipment was inadequate to finish the work in time (R. 36, 41). He was in the hospital from July 15th to October 15, 1934 (R. 38). He first visited the job November 2, 1934 (R. 38). Then 5 of the 9 towers had been completed, and No. 4 was finished November 28, 1934 (R. 16). Fogg made no criticism of the equipment or otherwise until December 18, 1934 (Deft's. Ex. D). The work was then nine-tenths done. Much work could not be

done with machinery, but that had to be done by hand (R. 25, 26, 28).

Davies charges petitioner with delays, (1) from the caving in of sheet piling at site 6-C (Deft's. Ex. Y, Sept. 13th), but this was due to petitioner's relying on respondent's wrong estimate that it was necessary to drive the foundation piles only ten feet (Plf's. Ex. 2, Addendum 2), whereas stable ground was only reached much lower (R. 32, 31); (2) while petitioner was trying diligently to pull a shovel out of the mud into which it and the mat under it sunk; and (3) with minor delays, but Davies does not claim that petitioner was not doing other work the times charged as delays (R. 33), and the inspector's reports show that he was.

Nor does Davies claim that progress of the work was delayed by failure to work on all branches of it at the same time (Deft's. Ex. Y, August 15th-September 13th).

Moreover, Davies was not qualified as an expert or by adequate observation to testify as to these alleged delays. (20 Am. Jur. § 813, p. 683.)

Respondent caused a delay to six weeks after the completion date through underestimating the lengths of site 6 piles (R. 25, 31), and also from September 1st to the 10th (Plf's. Ex. 16).

(b) Fogg and Davies claim that two crews should have worked simultaneously, but they did, and, at times, more than two (R. 15; Deft's. Ex. Y), and Fogg testified that petitioner had enough men (R. 37).

(c) Petitioner is entitled to recover his expenditures, as respondent did not show that they were extravagant, or unnecessary (*U. S.* v. *Behan*, 110 U. S. 338, 344, 345).

(d) Had the equipment been unequal to the difficulties encountered, but not anticipated by petitioner as he was misled as to the site, delays therefrom could not be charged to him. (*U. S.* v. *Atlantic Dredging Co.*, 253 U. S. 1.)

(d-1) Respondent's failure to call its inspector raises the presumption that he would have testified that the equipment was adequate, and that petitioner was not chargeable with delays, but proceeded with reasonable diligence (9 Cyc. of Ev. 967). This is emphasized by calling instead Fogg, who had no adequate opportunity to observe (14 Cyc. of Ev. 175).

(e) The refusal of the court below to find that petitioner suffered a loss of $26,796.54 was in violation of Rule 41 of this Court (S. E. 17-b).

(f) The change orders (Deft's. Exs. A, C) are not involved: The prices paid under them covered the work done and material used in the changes, but nothing for the consequential delays and increased cost they caused, to which petitioner is entitled (*Rust Engineering Co.* v. *U. S.*, 86 Ct. Cls., p. 466; *Sobel* v. *U. S.*, 88 Ct. Cls. 149, 165).

(VI) *The Court erroneously found the release binding as to claims for damages outside the contract* (*S. E. 17-b*).

(a) The release is not binding as to the damages because petitioner could only get a payment then due by signing it: Fogg said—"no change order, no money" (R. 37); it was equally true that "no release, no money", and petitioner had to have the money for his payroll; he had no other means of meeting it. He had $18,874.96 tied up in the work. His pay had been held up two months (R. 27). (*Ingram* v. *Lewis*, 37 F. (2d) 259; cases quoted 70 A. L. R. 711; 84 A. L. R. 296 to 298 incl., and 64 A. L. R. 121, 122; *Hanson* v. *Fowler*, Fed. Cas. No. 6042, Vol. II, p. 469, 471; *Dunbar* v. *U. S.*, 65 Ct. Cls. 567).

(b) When the release was executed only what it admitted as due on the contract was paid by respondent,—nothing for the damages outside the contract, and the release should

not be extended to the damages but be confined to what was paid.

(*Fire Ins. Co.* v. *Wickham*, 141 U. S. 564; *Piatt's Admr.* v. *U. S.*, 89 U. S. 496; *Atlantic Greyhound Lines* v. *Metz*, 70 F. (2d) 166; *Alexander Kiskadden, Admr.* v. *U. S.*, 44 Ct. Cls. 205; *Nelson* v. *Chicago Mill, Etc., Co.*, 76 F. (2d) 17, 24; *Plato* v. *U. S.*, 86 Ct. Cls. 665, 678; *Pneumatic Gun Carriage & Power Co.* v. *U. S.*, 36 Ct. Cls. 71; *Sanborn* v. *U. S.*, 46 Ct. Cls. 254; *Sheridan-Kirk Contract Co.* v. *U. S.*, 53 Ct. Cls. 82; *3 Williston on Contracts* (Revsd. Ed.) § 619, ps. 1784, 1785; *4 Pages on Contracts*, §§ 2451, 2452, ps. 4343, 4344).

(c) The release was given pursuant to a provision of the contract that the contractor shall release "all claims * * * other than such claims * * * as may be specifically excepted * * *" (Plf's. Ex. 1, p. 6).

(1) This provision securing petitioner the right to except his claim for damages should be given effect (*Woolworth Co.* v. *Peterson*, 78 F. (2d) 47).

(2) Failure to except should not be held to have defeated this claim because it would be,—

(a) Unequal and unjust (*Knowlton* v. *Moore*, 178 U. S. 41, 77);

(b) That its performance is impossible, which should be avoided (*E. I. DuPont DeNemours & Co.* v. *Clairborne-Lens Co.*, 64 F. (2d) 224, 228);

(c) In conflict with the purpose of the provision, whereas it should subserve it (*Legal Tender Cases;* 2 Wall. 457);

(d) On account of failure to give notice of the claim through excepting (obviously the purpose of excepting), but petitioner had given notice through previous repeated protests that the contract price and time were inadequate (R. 26, 27; Plf's. Ex. 8), and there is no proof that respond-

ent suffered through an exception not being made at the time of the release (*Am. Ship Bldg. & Dock Corp.* v. *John Rourke & Sons,* 4 F. (2d) 845, 846).

(c) A forfeiture when it is not clear from the language of the provision that the parties provided for a forfeiture (*17 C. J. S.* § 320, ps. 742, 743; *Texas Co.* v. *Pensacola, Etc., Corp.,* 279 F. 19, 26, 27; *Gen. Contracting Co.* v. *Grignon,* 255 F. 952, 954).

(VII) *The Court of Claims Erred in Refusing to Find That the Contract Provided That Petitioner Should Not be Charged With Liquidated Damages Because of Delays in Completing the Work Due to * * * Floods * * * (Contract Art. 9, p. 5; Plf's. Ex. 1); and That Floods Delayed the Work, Making it Almost Impossible, and That Petitioner Would Have Completed the Work in Time But for Floods (S. E. 9; (b), (d) of S. E. 10; S. E. 15), and in Sustaining the Assessment of $3,950 of Liquidation Damages. (S. E. 17-b).*

(1) (a) The contract provision above cited exempted petitioner from liquidated damages for delays due to floods; and

(b) There were floods throughout the time the work was done, which delayed the work. (Pt. I (a) hereinabove.) Fogg knew that the site would be flooded (R. 39, 40, 43).

(2) Respondent, through inadequate culverts; through showing drains on its map (with petitioner's right to assume them sufficient), which were inadequate; and through failure to disclose its full knowledge of the site, and misrepresenting it—in each instance breached the contract, and caused the delays (Pts. I, II, and III above), and it can not therefore retain anything as damages.

(3) Respondent granted extensions for delays which it caused, and the parties did not at the time or ever fix the

damages for delay or until long after the work was finished attempt to fix the time for completion after the extended periods (Change Order, Deft's. Ex. B), and respondent can not recover these damages, if any, outside it, under the contract stipulation, and can not recover other damages because it proved none. (*U. S.* v. *United Engineering & Co.,* 234 U. S. 236, 242.)

(4) This work was completed in February 1935, but no attempt to use the towers was made until 1936 (R. 34).

As the delay was no injury, respondent is not entitled to damages (*Scott* v. *Donald,* 168 U. S. 58).

(5) Had petitioner been chargeable with part of the delay, as respondent admits that it delayed the work, petitioner cannot be assessed damages: The courts will not apportion the delays (*Bethlehem Steel Co.* v. *U. S.,* 75 Ct. Cls. 845; *Caldwell & Drake* v. *Schmulbach,* 175 Fed. 429, 434; *Vilter Mfg. Co.* v. *Tygart's Valley Brewing Co.,* 168 Fed. 1002; *U. S.* v. *United Engineering Co.,* 234 U. S. 236).

(VIII) *The court below erred in making special findings of fact, and in making ultimate findings not substantiated by the findings of evidentiary or primary facts (S. E. II), as follows:*

(1) "The party proceeded to the site of each tower and viewed the existing conditions" (Find. No. 4; R. 14), which (as shown under Pt. I (d) above) is in error, and conflicts with this finding and with Fogg's testimony that Towers 3-A, 4 and 6 were in the marsh, and "that the party did not venture on marshy ground" (R. 15, 39, 43).

(2) "All the sites had sufficient access thereto for inspection was made possible by a trail cut through the grass by a native using a machete" (R. 15), which is erroneous ((d) of Pt. III).

(3) "The contractor based his bid on the inspection thus made * * *. Defendant's officers made no representation * * * that the site was otherwise than it appeared to be and concealed no material fact * * *," (R. 15), which is erroneous ((c) of Pt. III, Pt. IV). Also petitioner based his bid on the inspection trip, and the maps, drawings, and contract (R. 27).

(4) "The buckling of the sheet piling * * * could have been avoided by a more efficient form of cofferdam, and the use of shoring" (R. 15), which is erroneous (Pars. 4, 5, (a) of (3) of Pt. V).

(5) "The miring of petitioner's shovel delayed the progress of the work," (R. 16), which is erroneous (Id.).

(6) "The contractor consumed more time * * * than estimated * * * by lack of equipment adequate for the conditions actually encountered, breakdowns * * *, and the failure to * * * work more vigorously. The delays * * * threw the work into * * * dry weather * * *, during which * * * the work could be done faster than during the rainy season," (R. 17, 18), which is erroneous (Id.).

Also the delays in inspecting wire (R. 16), in making tests at sites 1 and 6 (R. 32), in exchanging piles between sites (R. 25), and in procuring new piles from the United States, alone prevented completing the work on time, October 7, 1934 (R. 12, 25), and threw it into the worst rainy season—it rained 26 days in October and 27 days in November (Deft's. Ex. Y). Respondent admits 45 days of the above delays (R. 16), and that the new piles required from the United States ordered October 13th (Plf's. Ex. 10), did not arrive until November 20, 1934 (R. 31).

(7) "For all delays occasioned by the Government there has been given the contractor adequate extensions of time

for performance, together with fair and reasonable compensation" (R. 17), which is immaterial. The material used and the time taken in changes were paid for but nothing was paid for the consequential delays and added expense ((f) of Pt. V).

(8) "There is no proof that the decision of the Secretary of the Navy, on appeal, was mistaken in matters of fact," (R. 17), which is erroneous (Plf's. Ex. 5, Pts. I, II, III, and IV), and the Secretary had no jurisdiction over the issue here as to damages, outside the contract, and appeal to him was unnecessary (*Phoenix Bridge Co.* v. *U. S.*, 85 Ct. Cls. 603, 630).

(IX) *The court below erred in making its conclusions of law* (R. 17, 18), *and in failing to render judgment for petitioner, as shown under the Points above.*

(X) *The court below erred in making the findings in its opinion as listed under specification of errors IV, as shown by the Points above in this brief. "The special findings may not be aided by statements in the * * * opinion of the Court * * *"* (*U. S.* v. *Esnault-Pelterie*, 299 U. S. 201, 206).

Conclusion.

(1) Inadequate culverts across the main ditch backed up the water and kept the site flooded. They were artificial obstructions, bringing delay and loss for which respondent is liable for breach of its agreement that such obstacles would not be encountered. Water stood 2 feet above the ground 12 hours after a rain (R. 26, 29). It rained the following number of days each of the following months: 14 in August; 14 in September; 26 in October; 27 in November (Deft's. Ex. Y). Pumps had to be used 2086 hours—260 eight-hour days (through use night and day), on a job that took only 223 days (Id. Pt. I above).

(2) On the contract map drains appeared, which Fogg said were being extended. Petitioner had the right to assume that they would drain the site. They failed to do this, causing delays and loss, for which respondent is liable (Pt. II above).

(3) Fogg, the officer in charge, knew that the site would be flooded and difficult to work in, but he failed to disclose the facts to petitioner, and violated respondent's agreement that he would furnish petitioner this available information, also causing petitioner delays and loss, and for this breach of agreement respondent is liable to petitioner (Pt. III above).

(4) The parties did not know the depth to which the unstable conditions of the soil descended. Respondent underestimated it in the specifications, misleading petitioner, and necessitating driving 91 out of 180 piles deeper than specified, exchanging piles between sites over soil so unstable as to be subject to slides, causing delays and added expense. Because of this most substantial change in the work, and of an unforeseen and far more difficult subsoil to excavate than could be inferred from the specifications, respondent is liable to petitioner for his loss (Pt. IV above).

The court below refused to find any of these highly material facts, based on undisputed and indisputable evidence, or the conclusions of law to which they entitle petitioner, in violation of Rule 41 of this Court. We respectfully submit that this petition should be granted.

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(1918)

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No. 672

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

H. B. NELSON CONSTRUCTION COMPANY,
PETITIONER

v.

THE UNITED STATES

REPLY BRIEF FOR PETITIONER.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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IN THE

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No. 672.

H. B. NELSON CONSTRUCTION COMPANY,
PETITIONER
v.
THE UNITED STATES

REPLY BRIEF FOR PETITIONER.

I.

This action is to recover the damages suffered by petitioner in the performance of a contract for the construction of foundations for radio towers through respondent's misrepresentation as to the site, and omissions to disclose material facts as to the nature of the site, and through a breach of contract as to what petitioner would encounter in doing the work. (Ptnr's. Orgnl. Brf. ps. 27-35.)

Respondent contends,—

First, that its officers made no representation that the site was different from what it appeared to be, and

concealed no material information, and that this contention is supported by the testimony of Public Works Officer Fogg. (Rspdt's. Brf. p. 10.) This claim is covered by III of petitioner's original brief, pages 30, 31, 32. There is to be added here only,—(a) that respondent does not deny exhibiting a map to petitioner not indicating that the site was swampy, when it had made and had one showing this condition (R. 23, 24); (b) Fogg knew that the site would be difficult to work in because it would be flooded (R. 38-40, 43). Yet the only definite thing he told petitioner was that the drainage system was being extended (R. 36, 43), which created the belief that the site would be well drained; (c) Fogg made so many contradictory statements that his testimony is entitled to no weight, (Ptnr's. original Brf. ps. 30, 31, 32); and (d) respondent stated that "information respecting the site in the drawings", (as to the borings), "is believed to be reasonably correct" (Spcl. Findings, R. 14), yet respondent had only "made probings with a pointed rod to determine the nature of the subsoil", (*Id.* R. 12), which could not and did not furnish sufficient information (Ptnr's. Orgnl. Brf. p. 33), and presenting the result to petitioner was a representation that sufficient exploration had been made; which was a deception, entitling petitioner to recover his damages. (U. S. v. Atlantic Dredging Co., 253 U. S. 1, 12; Montrose Contracting Co. v. Westchester County, 94 F. (2d) 580, 582, 583.)

Second, respondent claims that petitioner's representative should have seen that the site was swampy and the drainage inadequate. It appears without the possibility of dispute that the representative could not have seen the swampy condition, or that the drainage was inadequate, (Ptnr's. Orgnl. Brf. ps. 32, 33).

Third, respondent says, (Brf. p. 10), that there is nothing to show that the Court below did not consider the facts stated above, and, that if true, they would not require a finding of misrepresentation and concealment.

(a) Showing petitioner a map on which the swampy conditions of the site did not appear, and concealing the map showing the site to be swampy (R. 24) was both misrepresentation and concealment, as was also Fogg's stating that the drainage system was being extended, and failing besides, as he well knew that the site would be flooded to so advise petitioner, and as was also presenting drawings of the punch rod soundings, as representing the condition of the subsoil, when they were insufficient to determine this. It is undisputed that respondent misrepresented and concealed these things. Petitioner was entitled to findings of fact on these matters, and to recover his damages. (Ptnr's. Orgnl. Brf. ps. 32, 33, and authorities cited.)

Fourth, respondent says petitioner is not entitled to recover on a *quantum meruit* because 91 out of 180 pilings had to be driven deeper than indicated, (Brf. ps. 10, 11).

This contention is answered in petitioner's original brief, ps. 33, 34. It remains here only to add that as stated above ((d) of First) presenting the punch rod soundings as adequate information as to the nature of the soil was a deception, entitling petitioner to recover. (U. S. v. Atlantic Dredging Co., *supra;* Montrose Contracting Co. v. Westchester Co., *supra.)*

Moreover, that so many and such material changes entitled petitioner to recover his damages on a *quantum meruit* is held by the technical works on building and by the Courts, because only in this way can justice be done, (Henderson Bridge Co. v. McGrath, 134 U. S. 260; Salt Lake City v. Smith, 104 F. 457, 466,—quoted and approved in Drainage Dist. No. 1, 21 F. (2d) 257, 261; Bates and Rogers Const. Co. v. Board of Com'rs., 274 F. 659, 667; Mass. Bonding & Ins. Co. v. John R. Thompson Co., 88 F. (2d) 825, 829; Plum Bayou Levee v. Roach, 174 F. 953, and see quotations from these cases in (2) of Pt. I of Case No. 673, same title in this Court.

Fifth, respondent's only answer to the fact that inadequate and improperly constructed culverts backed up the water, hindered the drainage, caused floods and hindered and delayed the work, (Ptnr's. Orgnl. Brf. p. 28), is the technical claim that the obstructions covered by Section 2-01 "are such as would be physically encountered in excavating". It will be seen however, (1) that this Section 2-01 deals with "elevations and obstructions", and covers all "surface elevations" of the site expressly and quite obviously all under surface conditions as well; and (2) that "excavations" are covered by the succeeding paragraph.

The general, broad purpose was to protect petitioner against the hindrance of an artificial obstruction, wherever encountered,—not to limit this protection to the obstruction being encountered at a particular place or in a special way, as respondent contends, (12 Am. Jur. §242, p. 778). A bidder would understand the provision as broad and general and not narrowly limit-

ed as contended, and to hold that it so limited would be to make it operate as a snare, (*Id.* §250, p. 793). An interpretation most beneficial to petitioner as promisee, and because the contract was prepared by respondent, should be adopted, (*Id.* §252, ps. 795, 796).

Sixth, respondent fails to refer to the fact that drainage ditches were shown on the map exhibited to petitioner (Plf's. Ex. 5; Deft's. Ex. T; R. 38), and that Fogg, respondent's officer in charge, to induce petitioner to believe that they provided adequate drainage, stated that the drainage was being extended (R. 23, 25, 36).

Petitioner's right to recover on account of these circumstances is covered in his original brief under (II) pages 29 and 30.

II.

Respondent answers petitioner's contention that the release covered only what respondent conceded to be due, and did not extend to the present claim for damages, by urging on the authority of Williston on Contracts, that, as the right to receive a release was reserved by the contract, the exacting it was not duress (Res. p. 9). Of course, respondent had the right under the contract to a release of what was due on the contract. It had no right to a release of the damages outside the contract, and compelling a general release alleged to cover the damages was duress.

The changes, delays and extra cost did not arise under the contract, but because of respondent's many breaches of it, entitling petitioner to his damages.

"But where" (as here) "there are two claims, dependent on different facts, one of which is undisputed and the other of which is disputed, the payment of the undisputed claim does not bar the right to sue for and recover on the disputed claim." (Keene v. Gauen, 22 F. (2d) 723, 724.)

(See also Owensboro Ditcher & Grader Co. v. Markham, 32 F. (2d) 564, 565; Mattock Coal & Iron Corp. v. New York Quebracho Extract Co., 32 F. (2d) 275, 276; Pollocks Principles of Contracts, 9th Ed., 545; Chitty on Contracts, 18th Ed. §4, Ch. XXIII, p. 873; the authorities cited under Point VI of Petitioner's Original Brief pages 37 to 39 incl.)

III.

Respondent urges that liquidated damages were properly assessed because the contracting officer found that petitioner was not entitled to remission of them which was affirmed by the Secretary of the Navy, and will not be disturbed by the Court, because, as claimed, the decision was not so arbitrary or capricious to imply bad faith.

This question is fully covered in Petitioner's original brief under (VII) pages 39 and 40.

It should be added, however, that respondent contends that Art. 9 of the contract (Plf's. Ex. 1) does not exempt petitioner from liquidated damages because

"* * * all of these provisions" (of Art. 9) "refer to *force majeur*, which would necessarily pre-

clude the contractor from doing any work on the contract." (Res. p. 13.)

The part of Art. 9 involved reads as follows,—

"* * * the contractor" (shall not be) "charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes." (Plf's. Ex. 1.)

This provision is not susceptible of the interpretation placed on it by respondent: It is not necessary that the floods shall be such,—

"which would necessarily preclude the contractor from doing any work on the contract" (Res. p. 13),

but the provision expressly provides for *delays* and is not limited to *stoppages* of the work; and that the provision does not refer exclusively to "*force majeur*" is shown both by an enumeration of the many causes which entitle the contractor to exemption, including "unusually severe weather", and while a large number of causes is enumerated, it is provided that it is not restricted to them, but includes all causes which are unforeseeable and beyond the control and without the fault or negligence of the contractor, as was the case here; and lastly, "acts of the Government" are included, and these floods, beyond question, came about

through the Government's providing an inadequate and improper culvert.

Conclusion.

Respondent urges that certiorari should be denied because there is no conflict of decisions, and no question of importance is involved.

The decision here is in conflict with,—

(1) All the authorities on a contractor's right to recover his loss suffered through *misrepresentations and failures to disclose* cited under Point I of this brief, and III of Petitioner's Original Brief, page 33.

(2) The authorities cited holding petitioner entitled to recover because of respondent's breach of its agreement that "no *artificial obstruction* shall be encountered" under I of Petitioner's original brief on page 29, and under Fifth of Point I of this brief.

(3) The authorities holding petitioner entitled to recover his damages suffered through respondent's material misrepresentation as to subsoil conditions, and because these conditions could not have been foreseen, cited under IV, original brief, pages 33, 34, and under Fourth of Point I this brief.

(4) The authorities holding that petitioner is entitled to recover because of respondent's misrepresentation and "deception" that it had made sufficient borings to show the nature of the subsoil, whereas it had

made only inadequate punch rod soundings, cited under (d) of First of Point I, and under Fourth of II of this brief.

(5) The authorities holding that presenting petitioner a map showing drains, and assuring him that the drainage system was being extended, entitled petitioner to recover the damages he sustained through their proving inadequate, cited under II, page 30, Original Brief. *Respondent does not attempt to answer these authorities.*

(6) The authorities holding the release given for a sum conceded due on the contract is not binding as to the present claim for damages, cited under VI, pages 38, 39, Original Brief, and under Point II, this brief.

(7) The authorities holding that respondent was not entitled to liquidated damages, cited under VII, page 40, original brief, and under Point III, this brief.

(8) With petitioner's right to controlling findings,—

(1) That respondent misrepresented and failed to disclose the nature of the subsoil by presenting a map not showing the site as swampy, when it made and had one showing this condition (Spec. Error No. 1); by the failure of its officer in charge to disclose that the site would be flooded, which he well knew, and stating instead that the drainage system was being extended (*Id.* Nos. 3, 4); by representing that it had made adequate borings, when it had only made inadequate punch rod probings (*Id.* No. 6);

(2) That respondent misrepresented the subsoil condition so that half of the piles had to be driven deeper than specified *(Id.)*; that the subsoil was more unstable and difficult to work in than was foreseen, necessitating a complete change from the contract work *(Id.* Nos. 10-15); that petitioner suffered a loss of $26,796.54 *(Id.* No. 17-b);

(3) And conclusions of law that petitioner is entitled to recover on account of the above described misrepresentations and failures to disclose material facts, and because of its breach of contract as to artificial obstructions, and because drains were shown in the drawings exhibited, and respondent stated that they were being extended *(Id.* Nos. 1-15).

It is respectfully urged that certiorari should be granted.

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No. 672.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

H. B. NELSON CONSTRUCTION COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR REHEARING.

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Dated: March , 1941.

BATAVIA TIMES, LAW PRINTERS,
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Supreme Court of the United States

October Term, 1940

No. 672.

H. B. Nelson Construction Company,
PETITIONER
v.
The United States

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petition for Rehearing.

Comes now the above named petitioner, Nelson Construction Company, and presents this its petition for a rehearing on its application for a writ of certiorari to review the judgment of the Court of Claims in the above entitled cause. Petitioner's application for such writ was denied by this Court on March 3, 1941.

Ground for Rehearing.

This petition for a rehearing is filed under Rule 33 of this Court.

The primary ground for this petition is the departure by the Court of Claims from the accepted and usual course of judicial proceedings within the meaning of Rules 41 and 38, subdivision 5, of this Court,

in failing to make findings of fact on the material issues which, uncorrected, would deny a judgment required by uncontradicted and sufficient evidence, in conflict with the decisions of the Court of Claims, of this Court, and of the various Federal Circuit Courts of Appeal, and the Fifth Amendment to the Constitution evidenced by the facts that:

1. The Court of Claims based its decision entirely upon the erroneous theory that petitioner's claim for damages for respondent's breach of contract, misrepresentations, concealments, failure to disclose material facts, and for work required and delays due to conditions not contemplated under the contract, is controlled by the provisions of the contract.

2. Because of its reliance upon such provisions, the Court of Claims did not concern itself with what are conceded by respondent's counsel in his brief to be the undisputed facts of the case as set out in the Petition and Brief, pages 2-11, material to the problem involved.

3. The Court of Claims failed to make special findings of facts, on undisputed facts, requested by petitioner, which it was required to make under Rule 41 and the decisions of this Court, the Act of May 22, 1939, C. 140, 53 Stat. 752, Sec. 288, Title 28 U. S. C. A. and the Fifth Amendment to the Constitution. (Spec. of Errors, ps. 11-19).

4. The result reached by the Court of Claims cannot be reconciled with or sustained by the admitted facts which clearly entitle petitioner to the recovery

asked for under the decisions of this Court, the Court of Claims and the Circuit Courts of the United States. (Petitioner's Petition and Brief, ps. 21-24, 27-42).

I.

The Court of Claims did not complete the trial of this case, but left it undetermined: It did not make findings on any of the issues described below, each of which is highly important.

(a) The Court below refused to find the following undisputed facts:

(1) That there were culverts over the main ditch which were both inadequate and improperly constructed in that the base of the culverts was higher than the bottom of the ditch and above the surface of the adjacent ground, (R. 22, 26, 31).

(2) That because the culverts were of inadequate size, and improperly constructed in the base being above the bottom of the ditch and the surface of the adjacent ground, it backed up the water and hindered drainage of the site, and caused floods (R. 24-26); water remained two feet above the ground 12 hours after a rain (Davies, R. 26, 29), and it rained 14 days in each of the months of August and September, 26 days in October, and 27 days in November (Deft's. Ex. Y*); it was necessary to use pumps 2086 hours,—260 eight-hour days (Deft's Ex. Y; Fogg R. 37); the work was impeded, hindered, and delayed through the floods, making it almost impossible, as the men would be up to their waists in mud (R. 25, 26), making ma-

*The exhibits referred to are on file with the Clerk of this Court

chine work impossible, and making it necessary to do the work by hand (R. *Id.*, 28; Specification of Errors 10, 17-b).

(3) That petitioner expended in doing the work $67,996.38 (R. 27; Plf's. Ex. 7).

(4) That the increase in cost over the contract price of $53,071.42 (as modified by the change orders), (R. 17), was $14,924,96, which, with a 10% profit amounting to $6,799.64, and 1½% for the bond amounting to $1,121.94, makes a total of $26,796.54, (R. 27; Plf's. Ex. 7), petitioner's total loss and the amount unpaid and due him.

(5) That no proof was offered that any of petitioner's expenditures were extravagant or unnecessary.

(6) That,—(because of the foregoing undisputed circumstantial facts, and the fact found by the Court below that respondent agreed "that no artificial obstructions will be encountered," (Finding 3, ps. 12, 13), petitioner is entitled, under this Court's Rule 41, to a finding of the ultimate fact),—the inadequate and improperly constructed culverts were artificial obstructions which were encountered by petitioner in doing the work in violation of respondent's agreement, (Sec. 2-01, Specifications p. 7, R. 13).

(7) It was necessary that the Court make the above described findings, as through them petitioner becomes entitled to recover the $26,796.54, the extra cost and a profit, because of respondent's breach of its contract that petitioner would not encounter any artificial obstructions.

The word "encountered" is broad and general and includes the effect of the culverts through backing up the waters and flooding the site. It is not limited to actual contact with the culverts.

> "* * * had they" (the parties) "intended to so restrict" (the provision) "* * * it is to be presumed that language appropriate to the * * * limitation * * * would have been used. This was not done and the language actually employed must be given effect according to its obvious meaning, unaided by an implication of provisions which might have been, but were not, included." (Hunt v. Triplex Safety Glass Co. of S. A. 60 F. (2d) 92, 94).
>
> (See argument and authorities ps. 4 and 5 Reply Brief, and p. 29 of the original brief).

(b) The Court below refused to find the following undisputed facts:

(1) That respondent's representative, Commander Fogg, assured the bidders that the Panama Canal was extending its drainage system in the site (R. 36, 43), and respondent exhibited to petitioner a map showing drains there, (Plf's. Ex. 5; Deft's. Ex. T; R. 38).

(2) That the obvious purpose of said assurance was to induce petitioner to believe that the drainage system would be adequate.

(3) That,—(as the Court below found that *"There were drainage ditches * * * but their effect on the subsoil was not apparent"* on the inspection trip, (Finding 4, R. 15), and that the work took a longer

time because *of "the lack of drainage, the wet, marshy condition of the subsoil, and the miring of excavating or pile driving equipment"* (Finding 6, R. 16), and because of the above circumstantial facts),—petitioner is entitled to the ultimate findings,—That he was misled by drains appearing on the map, and on inspection of the site, and through Fogg's assurance, and through the effect of the ditches on the subsoil not being apparent, (as the Court found) into the belief that and had the right to assume that the ditches would be adequate to and would drain the site.

That it was necessary that the above circumstantial and ultimate findings be made, as because of them petitioner became entitled to recover his damages. (Horgan v. The Mayor, 160 N. Y. 516, 522, 523, quoted in the original brief, ps. 29 and 30; Sacramento Navigation Co. v. Salz, 273 U. S. 326, 329; General Fireproofing Co. v. L. Wallace & Son, 175 F. 650, 657, Certiorari denied 217 U. S. 607).

(c) The Court below refused to find the following facts, all of which are undisputed, except where stated otherwise:

(1) Before the making of the contract, respondent exhibited to petitioner a map which did not show the site to be swampy, although it had made and had a map showing the swampy condition. (Plf's. Exs. 5, 6; R. 24).

(2) In said map there appeared drains, and Commander Fogg, respondent's officer in charge, assured petitioner that the drainage system was being extended. (Plf's. Ex. 5; Defts.' Ex. T; R. 38; 36, 43).

(3) Respondent made only punch rod sounding, which (as is obvious and as is proven by the fact that over half of the lengths of piles had to be changed from the specifications), are inadequate, yet respondent by presenting them represented, contrary to the fact, that it had made sufficient subsoil explorations, and that these soundings showed the nature and bearing strength of the soil. (Plf's. Brief p. 33).

(4) Fogg, respondent's officer in charge, had been over the site a number of times, and was familiar with its nature and knew that it was a marsh, through which drainage ditches ran to take off storm water but that there were not enough of them to remove the water that soaked into the soil, and that the ditches were designed to release flood waters and prevent slides,—not to drain the site (R. 40), yet *he ventured no information as to the adequacy of the ditches* (R. 39).

(Note: While Fogg also stated that he gave bidders as full information as he could, he did not deny his testimony as stated above, and it is not to be assumed that he intended to do so by this general statement. Moreover, he was interested and peculiarly familiar with the facts, and the view of his testimony least favorable to respondent should be taken, (20 Am. Jur. §1182; Jones on Ev. 4th Ed. §857, p. 1590).)

(5) The site, when the inspection trip was made, was covered with guinea grass 6 to 8 feet high, so dense that you would get lost if you tried to go any distance off the trail, and, so, a trail had to be cut for the inspection trip (R. 35, 42). The party skirted around the edge of the swamp in which the site was located (R. 42, 43).

(6) The officer in charge told the bidders that the main new drainage ditch was put in for drainage of the area, and would be adequate to take care of the water, and other lateral drainage ditches were now being opened * * * which would take care of the water conditions (R. 23, 25).

(Note: Gillogly, petitioner's employee at the time, but when he testified not an employee and disinterested, swore to the facts in No. (6). Fogg denies this, but he made many contradictory statements and statements as though he had seen certain occurrences, despite his admission later that he was not present, to matters with which he could not have been familiar, and his testimony is not entitled to any weight. (His contradictions are covered in the original brief, ps. 31 and 32. See Hom Dong Wah v. Weedin, 24 F. (2d) 774, 775).)

(7) Because of proof of the above circumstantial facts, petitioner became entitled to the finding of the following ultimate facts necessarily inferred therefrom, viz.:

(A) From showing before the bid, the map from which the swampy conditions did not appear, and not that from which it did appear,—That respondent knew and concealed the swampy condition of the site.

(B) From showing the drains in the map, and the officer in charge stating that the drainage system was being extended, and from the fact that Fogg knew and testified that the drains were inadequate and not even designed to drain the site, but simply to carry off flood water, and prevent slides,—That respondent knew that the drains were inadequate and yet did not tell petitioner, but endeavored from what was said, to induce him to believe that they were adequate, and

thereby both concealed and misrepresented the facts and misled petitioner.

(C) From making only punch rod soundings and presenting them. That respondent knew that they were inadequate, and yet represented them as showing the subsoil conditions, which they did not show, and respondent thereby misrepresented the fact and misled petitioner.

(D) From skirting around the edge of the swamp in making the inspection trip,—That respondent endeavored to conceal, and did conceal, the swampy condition of the site.

(E) From the statement of the officer in charge that the drainage ditch would be adequate and that lateral ditches were being opened, which would take care of the water condition, contrary as Fogg knew to the fact,—That the conditions of the site were wholly misrepresented.

That all of these circumstantial and ultimate facts were material because they resulted in petitioner's being wholly misled as to the nature of the site, and prove also breaches of respondent's agreement that bidders "will be furnished with such additional information as is available by the local Government representatives," (Par. 7, Gen. Prvns., R. 14), and to his loss of the amount involved here, the particulars of which are stated hereinabove under (2) of (a) of this Point I. (See authorities cited p. 33 of the original brief).

(d) The Court refused to find the following undisputed facts:

(1) That 180 piles were driven. Their lengths were shown in the specifications, (Plf's. Ex. 2, Addendum 2, p. 1), but 91 were incorrect, necessitating exchanges between sites over ground so soft that mats had to be used (R. 25, 28, 31), trucks mired and had to be pulled out, and, at times, material had to be unloaded and carried by hand, (R. 25, 28) making the work difficult and expensive. New piles had to be ordered, causing a six week's delay (R. 25, 31), and into the extremely heavy rainy season (Deft's. Ex. Y, Oct. 7th to Dec. 1st).

(2) That,—(as the Court found *"longer piling than that estimated by the Government was found necessary at the locations for Towers 3, 5, and 6,—"* finding 5, R. 16,—*and those were all the towers where pilings were used,*—and because of the above circumstantial facts),—petitioner is entitled to the ultimate findings,—That there were material quantities of work resulting from the many changes, substantially variant in character from that contemplated by the parties when they made their agreement, which constituted new and different work which petitioner was required to do and did at an increased cost and taking a longer time; that the unstable condition of the subsoil was unforeseen by petitioner.

(3) These findings were material because they prove that the depth to which the subsoil was unstable was unforeseen, which entitled petitioner to recover his loss; and, also, prove that there were not alone changes in over half the piles, necessitating much ex-

tra work in itself, but that the transfers between sites were difficult and expensive, and that the delays in the arrival of the new piles continued the work into the heavy rainy season, when it was much more difficult, took much longer, and cost much more, which also entitled petitioner to recover his loss. (See authorities cited original brief, top of p. 34).

II.

Petitioner is entitled, as counsel believes, of right, to the material and controlling findings described under I hereinabove, under the decisions of this Court, a recent Act of Congress, and the Fifth Amendment to the Constitution.

(a) Petitioner, as appears above, proved without dispute, that he was entitled to recover on the issues involved, viz.:

(1) On breach of respondent's agreement that no artificial obstructions would be encountered;

(2) Because petitioner was misled by drains appearing on the map shown him, and on the inspection trip, and through Fogg's assurance as to them, and through the effect of the ditches on the subsoil not being apparent;

(3) Because of the concealments and misrepresentations as to the nature of the site, described hereinabove under (c) of Point I, and breaches of respondent's agreement that bidders "will be furnished with such additional information as is available by the Government representatives;" and

(4) Because of substantial and material changes in the nature of the work to be done, owing to unforeseen subsoil conditions.

With these many issues clearly established in petitioner's favor by uncontradicted evidence, the trial ended in an incomplete state,—no findings being made on any of the circumstantial or ultimate facts hereinabove described.

(b) This Court has uniformly held that a party is entitled to have findings made on all material issues, and has so held very recently in U. S. v. Esnault-Pelterie, 299 U. S. 201, 205. Such has been the ruling of this Court from the earliest days. (Mahan v. U. S. 14 Wall. 109-112).

(c) This Court, in U. S. v. Esnault-Pelterie, 303 U. S. 26, 32, held that it could not review the facts because the Record did not contain the evidence, due to

> "* * * the procedure * * * established by the Congress for the determination of claims against the United States,"

whereupon Congress passed the Act of May 22. 1939, §288, Title 28 USCA, providing that:

> "* * * the Supreme Court shall have authority to review" (when the evidence has been certified to it), "in addition to other questions of law, errors assigned to the effect that * * * there is a failure to make any findings of fact on the material issues."

Congress thereby agreed with the rule established by this Court that the right to the completion of a trial should remain sacred and inviolate.

This is true generally. How much more so here with undisputed evidence, yet no findings!

(d) Because of the establishing of each of the issues hereinabove described under (a) of this Point, petitioner became entitled to the extra cost, plus a profit, which is property, of which he will be deprived without due process of law, unless findings on these issues are made, and, so, a question is involved under the Fifth Amendment to the Constitution. (Fayerweather v. Ritch, 195 U. S. 276).

(e) On each of the many issues described under Point I, and under (a) of this Point, there is no possible defense to petitioner's recovery for the value of his work. Respondent sets up a release, but that it does not effect the claim for damages now urged is fully shown at pages 10, 11, 37 to 39 incl. of the original brief, and pages 5 and 6 of the Reply brief; and, besides, this Court holds that where, as here, respondent has been arbitrary to the extent even of withholding up petitioner's pay for months, the latter is not bound by the failure to except damages from a release given. (U. S. v. Smith, 256 U. S. 11, 16). Moreover, petitioner's claim for payment of the amount retained for liquidated damages was expressly excepted. So, as to it, the right to Certiorari can not on any sound ground be contested. (See petitioner's original brief, ps. 39 to 42 incl., and ps. 6 to 8 incl. of the Reply brief).

(f) This failure to make findings on the issues is the ground of this petition for rehearing, and because counsel feel that they may not have made this entirely clear, a rehearing is asked.

III.

(a) While petitioner did not urge it in his petition or briefs, and indeed it did not occur to him, is there not a grave public question in this case?

This Country is engaged in a herculean effort to prepare to defend itself against Foreign aggression. This necessitates efficiency and haste. It is in the hands of contractors,—manufacturers and builders. Success depends on them.

It is of vital importance to them to know that the Government can not violate its agreements as to conditions to be encountered, or as to furnishing the contractor available information, or conceal or misrepresent material facts, resulting in increased cost without being liable therefor, and the Nation is interested to have the best efforts of the contractors, undisturbed by worry whether they will be able to collect the amounts justly due them.

The right to a completed trial is fundamental and a basic one. The case at bar involves, as pointed out in the two preceding briefs, a conflict with all of the preceding cases on the issues involved. It is urged further that a grave question, of vital importance to the Nation, is also at stake, and that to sustain the judgment below, without findings of fact on the material issues, would deprive petitioner of his property without due process of law, (Fayerweather v. Ritch, *supra*).

For all the foregoing reasons and including those set forth in the Petition, Brief and Reply Brief, peti-

tioner urges that this petition for a rehearing and the writ of certiorari be granted.

Respectfully submitted,

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Dated: March 22, 1941.

Certificate of Counsel.

I, S. WALLACE DEMPSEY, one of counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

S. WALLACE DEMPSEY,
Counsel for Petitioner.

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293969—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 672

H. B. NELSON CONSTRUCTION COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 18–22) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 3, 1940 (R. 22). A motion for a new trial was overruled October 7, 1940 (R. 22–23). The petition for a writ of certiorari was filed on January 4, 1941 (R. 47). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the Court of Claims made proper findings of fact.

2. Whether the United States violated any obligation or warranty of the contract.

3. Whether petitioner released his claim for breach of contract.

4. Whether petitioner is entitled to remission of liquidated damages.

STATUTE INVOLVED

Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752 (U. S. C. Supp. V, Title 28, Sec. 288, provides:

> (b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue.

STATEMENT

On June 19, 1934, for a consideration of $47,816.00 petitioner entered into a contract with United States, acting through the Chief of the Bureau of Yards and Docks of the Navy Department, for the construction of concrete foundations for three 300-foot and six 600-foot radio towers at the Navy Radio Station, Summit, Canal Zone (R. 12).

The work was to be commenced within 10 calendar days after receipt of notice to proceed, and the foundations for the 300-foot towers were to be completed within 45 calendar days and for the 600-foot towers within 75 calendar days thereafter (R. 12). Notice to proceed was received by the petitioner on July 24, 1934, and the date for completion of the 300-foot towers was thereby fixed as September 7, 1934, and for completion of the 600-foot towers as October 7, 1934 (R. 12). The founda-

tions for the 300-foot towers were completed within the prescribed time, and are not involved in the present controversy (R. 12).

SECTION 2–01 of the specifications provided that bids should be based upon the assumption that the surface elevations were as indicated, that rock would not be encountered, and that no artificial obstructions would be encountered (R. 12–13). Paragraph 7 of the general provisions of the specifications stated that the information respecting the site given in the drawings and specifications had been obtained by Government representatives and was believed to be reasonably correct, but that the Government did not warrant either its completeness or accuracy. Intending bidders were invited to examine the site and acquaint themselves with the working conditions (R. 14). Paragraph 7 also stated that such bidders would "be furnished with such additional information as is available by the local Government representatives" (R. 14).

A representative of the contractor, together with a number of other prospective bidders, visited and made an examination of the site of the work (R. 14). The examination was made under the leadership of the Public Works Officer, the party proceeded to the site of each tower, and viewed the existing conditions (R. 14). It had rained the night before and the ground was wet, water standing in depressions (R. 14). High grass six to eight feet tall was growing on all of the sites, and access

thereto for inspection was obtained by cutting a trail through the grass (R. 15). The sites of towers 3, 4, 5, and 6 were on or near marshy land, but the party did not venture upon any marshy land (R. 14–15). There were drainage ditches in the general area in which the towers were to be located, but their effect upon the subsoil was not apparent (R. 15). The contractor based his bid upon the inspection made by its representative and made no application to Government officers for further information (R. 15). Such officers made no representations to the contractor or his representative that the site was otherwise than it appeared to be, nor did they conceal any material facts from either of them (R. 15).

The petitioner thereupon proceeded with the work and encountered certain difficulties and delays in the performance thereof (R. 15–17). This was due to various causes, among which were the wet, marshy condition of the subsoil, the buckling of sheet piling, lack of adequate equipment, miring of equipment, breakdown of equipment, lack of drainage, failure to prosecute the work more vigorously, and delays incident to changes authorized by the Government (R. 16).

There was a delay on the part of the Government in inspecting copper wire for the tower foundations, resulting in delay in placing the foundation of Tower No. 2, for which delay the contracting officer extended the time for completion of the

foundation involved by 10 days (R. 16). The contracting officer authorized the contractor to provide and place 720 1-inch dowels in pile foundations and to make a soil-bearing test on the foundation of footing C of Tower No. 1 (R. 16). For this extra work, the contract was modified in writing and the contract price was increased $470.88 (R. 16). It was also found necessary to use longer piling than that estimated at Towers 3, 5, and 6 (R. 16). On Tower No. 4, petitioner encountered rock in excavating, and he was required to provide a drainage ditch to protect footing C of the foundation for Tower No. 3 (R. 16). The contracting officer in writing increased the contract price by the sum of $4,784.54 for the extra-length piling, the rock excavation and the construction of drainage ditches, and extended the time for performance by 35 days because of these matters (R. 16). For all delays occasioned by the Government, petitioner secured adequate extension of time together with fair and reasonable compensation (R. 17).

The contract price, as modified by the change orders, was $53,071.42. Of that amount, petitioner was paid $49,121.42, the difference ($3,950) being assessed as liquidated damages for the delays in completing the foundations of Towers 3, 4, and 5 (R. 17). On April 12, 1935, petitioner executed a release to the Government of all claims arising under or by virtue of the contract except the right to protest the assessment of liquidated damages

(R. 17). On April 15, 1935, petitioner applied to the contracting officer for remission of liquidated damages. He refused to remit the damages, finding that there was an absence of misrepresentation of conditions at the site and that the conditions encountered did not differ from those reasonably to have been expected (R. 17). On appeal, the Secretary of the Navy sustained the action of the contracting officer (R. 17).

Petitioner thereupon brought suit in the Court of Claims seeking to recover the sum of $26,796.54, which was alleged to represent the difference between the cost of the work plus 10% profit and 1½% for a bond, and the amount actually received. Petitioner there contended that the United States had concealed and misrepresented the working conditions at the site, that the release had been signed under duress, and that liquidated damages had been improperly assessed (R. 1–6).[1]

The Court of Claims dismissed the petition, holding that there had been no misrepresentation by Government officers as to the working conditions to be encountered, and that in any event the petitioner had signed a release of all claims except those for the remission of liquidated damages. In respect of liquidated damages it held that they were properly assessed (R. 18–22). A motion for a new trial was overruled October 7, 1940 (R. 23).

[1] A second cause of action asserted in the petition (R. 6–10) is involved in *H. B. Nelson Construction Company* v. *United States*, No. 673.

ARGUMENT

Petitioner contends that the Government misrepresented and concealed the difficult working conditions under which the contract was to be performed, and so violated or changed certain obligations of the contract as to entitle petitioner to recover. Petitioner has assigned as errors[2] the action of the court below in making certain findings of fact, and its failure to find other facts which he asserts will sustain his contention; and urges that in any event he was improperly charged with liquidated damages for delays. We submit that the decision of the court below, both as to facts and law, was correct.

1. On April 12, 1935, the contractor executed the release under Article 16 (d) of the contract to the Government of "all claims arising under or by virtue of said contract" except "the right to protest the liquidated damages amounting to $3,950.00" (R. 17). The petitioner admits that he executed this release, but contends that he did so under duress, as it was necessary for him to receive his final payment to meet his pay-roll expenses, and that such payment was refused unless he executed the release (Pet. 37).

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[2] The specification of errors to be urged are 49 in number and occupy 10 pages (Pet. pp. 11–20). Under the rule announced in *Local 167* v. *United States*, 291 U. S. 293, 296, this Court might appropriately dismiss the instant petition for failure to comply with Rule 9.

Article 16 (d) of the contract provides that upon completion of the work under the contract, the amount due would be paid after the contractor had furnished the Government with "a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein" (R. 12, 20). The release, therefore, was not obtained by duress; the right to require it prior to final payment was authorized by the terms of the contract. An insistence on a right secured by contract is not duress. Williston on Contracts (Rev. Ed. 1937), sec. 1606. There is nothing in the contract which limited the character or amount of the claims which the contractor could reserve from the operation of the release, nor is there a scintilla of evidence in the record that petitioner in signing the release was compelled to forego any claim which he here urges. He may not, therefore, now assert any claim other than the one for liquidated damages in the amount of $3,950, which he specifically exempted from the operation of the release. Cf. *Hartsville Mill* v. *United States,* 271 U. S. 43.

2. Even assuming, without conceding, that the release did not comprehend the claims here advanced, petitioner's contentions are without substance.

(a) Petitioner contends (Pet. 21, 29) that the Government inferentially represented that the drainage system of the site of the project was adequate, that it omitted to inform petitioner that the site was swampy, and that the misrepresentation and omission each affords a basis for a cause of action for damages under the rule of *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, and *Christie* v. *United States*, 237 U. S. 234. The court below found, however, that respondent's officers made no representation that the site was otherwise than it appeared to be or concealed any material information (R. 15). And the finding is amply supported by the testimony of Commander Fogg, the Public Works Officer who conducted the inspection and was the responsible officer to whom inquiries should have been addressed (R. 34–43). It may be observed, moreover, that a representative of petitioner visited the site (R. 14) and should have observed that the site was swampy, and by the same token that the drainage system was inadequate. Petitioner emphasizes that the court below failed to find certain evidentiary facts, but there is nothing to show that these alleged facts were not considered by the court below (cf. *United States* v. *Goltra*, Nos. 191, 192, this Term, decided February 3, 1941), and even if they were accepted as true they would not require a contrary ultimate finding on the issue of misrepresentation and concealment.

(b) The contention (Pet. 22) that recovery may be had on a *quantum meruit* basis because many of

the pilings had to be driven to a greater depth than indicated on the specifications is plainly specious. The latent conditions which required these changes were contemplated by Article 4 of the contract (R. 13), and a change order was issued pursuant thereto allowing petitioner adequate extra compensation for the excess cost incurred by reason of the modifications required (R. 16). Moreover, petitioner was, as the evidence discloses, a member of the Board which approved these changes, both as to amounts and to extension of time (R. 35–36).

(c) There was no breach of conditions of the contract by respondent. Petitioner contends (Pet. 28–29) that a culvert, which he states backed up water, flooded the site and made the work more difficult, was an artificial obstruction within the meaning of Section 2–01 of the specifications which provided *inter alia* that bids were to be based upon the assumption that no artificial obstacles would be encountered, and that if encountered adjustment should be made as provided in Article 4 of the contract (R. 12–13). As clearly appears from the context of Section 2–01, the obstructions referred to are such as would be physically encountered in excavating.

3. The only claim of petitioner exempted from the release, and which he may now assert, relates to an improper assessment of liquidated damages. This claim is, we submit, without merit. Article 9 of the contract makes the decision of the contract-

ing officer on questions of delay, when affirmed by the head of the department, final and conclusive on the parties thereto.[3] The contracting officer has found that petitioner was not entitled to remission of liquidated damages, and his decision on appeal was affirmed by the Secretary of the Navy (R. 17). Such finding will not be disturbed by the courts unless the action of the officer concerned was so arbitrary or capricious as to imply bad faith. Cf. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520. Here, the court below found that the delay in the work was due to inadequate preparation and equipment on the part of the contractor, the wet marshy condition of the subsoil, the buckling of sheet piling, the miring of excavating or pile-driving equipment, lack of drainage, failure to prosecute the work more vigorously, and the changes authorized by the Government and its failure to inspect copper wiring promptly (R. 16). The court further found that for all delays occasioned by the Government there had been given to the contractor adequate extensions of time for performance (R. 17). The evidence supporting these findings of the court consists of testimony of the Public Works Officer, Commander Fogg (R. 34–43), and Leslie C. Davies, an employee of respondent (R. 28–33). We submit that the record discloses no bad faith on the part of the contracting officer and the Secretary

[3] See Plff.'s Ex. 1 on file with the Clerk of this Court.

of the Navy, and that the petitioner accordingly is not entitled to remission of liquidated damages.[4]

CONCLUSION

The decision of the court below is correct. There exists no conflict of decisions and the case does not involve questions of general interest. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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[4] Petitioner contends that Article 9 of the contract specifically exempts him from the assessment of liquidated damages for delays resulting from floods, and that he was entitled to findings disclosing that the site of the work was flooded. But the floods referred to in the proviso to Article 9 must be taken in their context, where they are associated with acts of God, the public enemy, and of the Government, fires, epidemics, etc. (R. 2). It is clear that all of these provisions refer to *force majeur*, which would necessarily preclude the contractor from doing any work on the contract.

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